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No. 93-639

In the Supreme Court of the United States October Term 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY

Respondent.

On Writ of Certiorari
To The District Court of Appeal of Florida
For the First District

BRIEF OF AMICUS CURIAE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, in Support of Respondent

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39 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the State of Florida's statutory scheme violates the First Amendment by prohibiting an employee of a firm that is not licensed as a public accounting firm from holding herself out to the public as a certified public accountant (CPA) when providing accounting and tax services to the public.

Whether the State of Florida's regulatory scheme violates the First Amendment by prohibiting certified public accountants (CPAs) who are practicing public accounting from using the term "certified" in connection with self-designations and titles not approved by the Florida Board of Accountancy.

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CONSENT OF THE PARTIES

Sylvia S. Ibanez, Petitioner, and State of Florida Department of Professional Regulation, Board of Accountancy, Respondent, have consented to the Florida Institute of Certified Public Accountants participating in these proceedings as Amicus Curiae in support of Respondent. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, FICPA is an active professional organization of approximately 18,000 Certified Public Accountants ("CPAs"), working to improve the accounting profession and to serve the public. The FICPA is the fifth-largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government, and education. Other membership categories include associate members, retired CPAs, and CPAs domiciled outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States; monitoring legislation affecting the practice of public accountancy; assisting in the development of auditing, accounting, and ethical standards; and educating the public with regard to the responsibilities of CPAs. These areas of activity relate directly to the issues now before this Court.

FICPA has been granted consent to file a brief in this matter as Amicus Curiae in support of Respondent by counsels for Petitioner and Respondent.

SUMMARY OF ARGUMENT

This matter is before this Court as a result of the State of Florida Department of Professional Regulation, Board of Accountancy ("the Board") entering a Final Order that concluded that Petitioner violated subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code. Petitioner appeals that Final Order which was affirmed per curiam by the Florida First District Court of Appeals, arguing that she has the constitutional right to practice public accounting as an employee of an unlicensed firm and to advertise her Certified Financial Planner ("CFP") status in conjunction with her Certified Public Accountant ("CPA") license.

Since 1931, the practice of public accountancy in Florida has been regulated pursuant to the State's police power. Under Florida's regulatory scheme, the practice of public accountancy is defined as a CPA providing services to the public involving the use of accounting skills or management advisory or consulting services while holding out to the public that the provider is a CPA. Except in areas not relevant to this case, the definition requires two separate elements: (a) the provision of accounting or management advisory or consulting services to the public, and (b) the holding out to the public that the provider of these services is a CPA.

In the proceedings below and before this Court, Petitioner admits both elements. Petitioner admits that, through her advertisements, she is holding out "to the world I am a CPA." She testified that her clients considered it "extremely valuable" she have an active CPA license and that she therefore considered it valuable for her to hold herself out to the public as a CPA.

Petitioner also admits that she is providing public accounting services by providing substantially the same services to the public in her current firm that she provided while working as a CPA for the national accounting firms Coopers & Lybrand and Main Hurdman. Petitioner testified that, as part of her current professional practice, she provides all types of tax services, including evaluating the tax consequences of specific transactions and providing her clients with financial counseling and planning services. All of these services involve the provision of accounting skills or management advisory or consulting services to the public and are substantially the same services she provided to the public when she worked for CPA firms.

As part of the licensure, educational, and technical requirements Florida imposes upon CPAs, CPAs are required to license their professional service corporations and partnerships with the Board. Fla. Stat. §§ 473.309, 473.3101 (1991). There is no dispute that the public accounting services Petitioner provides to the public are as an employee of an unlicensed firm, a violation of Chapter 473, Florida Statutes. As a result thereof, and by clear and convincing evidence, the Department of Professional Regulation (the "Department") established at the formal hearing that Petitioner violated subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code.

Because the practice of public accounting involves holding oneself out to the public, the State of Florida chose to characterize this violation as a false and misleading advertisement. However, if Petitioner's employer had been licensed, it would not have been illegal for Petitioner to hold herself out to the public as a CPA. There are a number of law firms in Florida who are also licensed

as CPA firms and whose members hold themselves out to the public as CPAs. Contrary to Petitioner's repeated assertions, Florida does not ban lawyers from holding themselves out as CPAs. It only requires that their firms be licensed under Chapter 473.

Petitioner's arguments that Florida's law violates the First Amendment are without merit. The State has a substantial interest in ensuring that those professionals who hold themselves out to the public as CPAs while providing public accounting services are indeed subject to the State's educational, technical, and licensure requirements. The regulation is narrowly tailored to accomplish its purpose and is rationally related to that purpose.

With regard to advertising her Certified Financial Planner ("CFP") status, the Department also established by clear and convincing evidence that, while engaged in the practice of public accounting, Petitioner violated section 473.323 and Rule 21A-24.001 by appending her CFP designation after her name in advertisements.

In addition, since 1982, the Florida Board of Accountancy has consistently issued letter opinions that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board. Rule 21A-24.001 permits the use of certain specialist designations as long as the statement contains a disclaimer that the recognizing agency is not affiliated with the state or federal government and contains the agency's requirements for recognition, including any education, experience, and testing requirements. Here also, Florida has a substantial interest in ensuring that the public is not misled when a specialist designation is utilized and its regulation is rationally related and narrowly tailored to prevent confusion. However, with regard to such designation, Florida does prohibit the use of the term certified unless approved by the Board. The State also has a substantial interest in ensuring that the public is not confused by the use of certain designations including "certified" and that such designations do not convey the impression that the designations are licensed by the State. Florida's regulation is rationally related and narrowly tailored to this purpose.

For the foregoing reasons, the decision below should be affirmed.

ARGUMENT

I. THE STATE OF FLORIDA'S REGULATION OF THE PRACTICE OF PUBLIC ACCOUNTING DOES NOT VIOLATE THE FIRST AMENDMENT.

In its Final Order, the Department determined that Petitioner is engaged in the practice of public accountancy as an employee in an unlicensed entity and that by holding herself out to the public as a CPA, she violated section 473.323 and Rule 21A-24.001 by engaging in deceptive and misleading advertisement. (J.A. 178-95) By asserting that the disclosure of her CPA status is constitutionally protected commercial speech under the First Amendment, Petitioner seeks the constitutional right to solicit the public as a CPA, to provide the requested accounting services, and to then ignore the State of Florida's regulatory requirements that accompany being a CPA. Petitioner's appeal challenges not only Florida's definition of public accounting and its "holding out" requirement, but the regulatory structure of all states that utilize "Title Acts" to regulate services.

A. The State of Florida Defines the Practice of Public Accounting as Providing Services Involving the Use of Accounting or Management Advisory or Consulting Services to the Public While Holding Out to the Public That the Provider is a Certified Public Accountant.

Since 1931, Florida has regulated the practice of public accountancy pursuant to the State's police power. In Heller v. Abess, 184 So. 122, 127 (1938), the Florida Supreme Court held the profession of public accounting was sufficiently charged with public interest to justify legislation providing for the registration of accountants and prohibiting the practice of accountancy as a CPA in the State of Florida without certification by the State. In keeping with that public interest, Florida has enacted Chapter 473, Florida

Statutes, and Chapter 21A, Florida Administrative Code, in order to regulate the practice of public accountancy.[1] This regulatory scheme seeks to ensure the integrity, independence, and objectivity of CPAs in the provision of public accounting services.[2]5

This Court has previously recognized it is critical that, in performing accounting services, CPAs "'maintain total independence' and act with 'complete fidelity to the public trust.'" Edenfield v. Fane, 507 U.S. ____, 123 L. Ed. 2d 543, 554-55, 113 S. Ct. 1792 (1993), quoting United States v. Arthur Young & Co., 465 U.S. 805, cert. denied, 466 U.S. 936 (1984).

With the exception of the attest function, any individual may provide accounting services to the public.[3] (J.A. 180) As a result, Florida regulates public accounting through a "Title Act," whose purpose is to protect the public by assuring consumers that CPAs who hold themselves out as CPAs meet the technical, educational, and other standards imposed by the Florida Legislature and the Board of Accountancy. (J.A. at 180-85) See also Mercer v. Hemmings, 170 So. 2d 33 (Fla. 1964). Licensure Acts, by contrast, prohibit all but the licensed individuals from performing the regulated activities. See, e.g., Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992).

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[1]Chapter 21A, Florida Administrative Code, has recently been recodified in Chapter 61H, Florida Administrative Code.

[2]The provisions include, for example, the technical standards set forth in section 473.315, Florida Statutes, and Rule 21A-22, Florida Administrative Code, the prohibitions on the use of commission and contingency fees set forth in sections 473.3205 and 473.31, Florida Statutes, and the disciplinary provisions of section 473.323 and Rule 21A-36.

[3]The attest function refers to the process by which a CPA audits financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accord with generally accepted accounting principles.

The statutory definition of the practice of public accountancy in Florida is:

> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by a certified public accountant, or firm of certified public accounts, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out . . . .

Fla. Stat. § 473.302(4)(a)(b) (1991). Except for the attest function and certain associations with financial statements that are not at issue in this case, the Florida Board of Accountancy has interpreted this definition to exempt from the practice of public accounting CPAs who do not hold themselves out as CPAs and CPAs who provide services only to their employer. See Rule 21A-20.011, Florida Administrative Code; Cenac v. Florida State Bd. of Acct., 399 So. 2d 1013 (Fla. 1st DCA 1981).

Therefore, to the extent that a CPA provides one or more types of accounting skills and management advisory or consulting services to the public, while holding out to the public as a CPA, such individual is practicing public accounting. (J.A. 183) Florida's definition requires two separate elements: (a) the provision of accounting or management advisory services to the public, and

(b) the holding out to the public as a CPA providing these services.[4] If only one element is present, the activity is not the practice of public accounting and is not subject to regulation by the State.

In Counts I and III of the Amended Administrative Complaint, the Department charged Petitioner with violating subsections 473.323(1)(a), (f), (g), and (h) and Rule 21A-24.001 by engaging in deceptive and misleading advertisements by rendering public accounting services in an unlicensed firm and by appending the CPA designation after her name in advertisements;[5] Count II charged Petitioner with violating subsections 473.323(1)(f) and Rule 21A-24.001 by providing public accounting services and by appending the CPA and CFP designation after her name in advertisements. (R. 032, 0103) At the hearing, the Department established by clear and convincing evidence that Petitioner is engaged in the practice of public accountancy in an unlicensed entity and that by holding herself out to the public as a CPA when providing these services, she violated section 473.323 and Rule 21A-24.001 by engaging in deceptive and misleading advertising.

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[4]"Holding out" has been defined as engaging in advertising or a course of conduct to inform the public. See, e.g., Evans v. Hoyme, 105 N.W.2d 71, 75 (S.D. 1960); Cenac v. Florida State Bd. of Acct., 399 So. 2d 1013, 1015 (Fla. 1st DCA 1981).

[5]Count I charged Petitioner with violating section 473.309, Florida Statutes, which prohibits the practice of public accounting in an unlicensed firm. (R. 032) However, because that charge was added late in the process, it was stricken on procedural grounds. However, the factual allegation of practicing in an unlicensed firm remained in paragraphs 8 and 9 of the complaint. The effect was to charge Petitioner in Counts I and III with violating subsections 473.323(1)(a), (f), (g), and (h) by deceptively practicing public accounting in an unlicensed firm by appending the CPA designation after her name in advertisements. See (J.A. 185, n.7) Although the underlying charge of practicing in a firm without a license was stricken, Petitioner admits to not having licensed her firm pursuant to this provision and the Board so found. Petitioner's Initial Brief at 21, 28.

B. The State of Florida Properly Sanctioned Petitioner for Rendering Public Accounting Services Through an Unlicensed Firm.

Petitioner asserts that she has "left the practice of public accounting" and "currently engages in the practice of law, as a sole practitioner and provides legal services for her clients not provided by CPAs." Petitioner's Initial Brief at 3, 4. Petitioner also admits, however, that she, "is, in fact, a licensee subject to the rules of the Board of Accountancy. . . . Like every licensed CPA in Florida, [Petitioner] is obviously regulated by the Board." Id. at 28, 18. The Department submitted clear and convincing evidence that as a licensee Petitioner is engaged in deceptive and misleading advertising in the practice of public accounting by: (a) providing one or more types of accounting or management advisory services to the public, (b) holding out to the public that she is a CPA, and (c) rendering such services as an employee in an unlicensed firm in violation of Florida law.

As to the first element, Petitioner admits that she currently provides services that CPAs provide and that she provided these same services when she worked as a CPA at the accounting firms of Coopers & Lybrand and Main Hurdman. These services include representing clients before the Internal Revenue Service, providing tax opinions, evaluating the tax consequence of certain transactions, as well as providing financial and estate planning. Petitioner's Initial Brief at 4. These services require that she analyze financial statements and give opinions based thereon. (R. 0460) All of these services involve the provision of accounting skills or management advisory or consulting services to the public. Petitioner utilizes her accounting education and skills and provides services that she

performed while practicing as a CPA for CPA firms. (R. 0461, 0464-66, 1225).

The fact that the same services can be provided by lawyers and CPAs, or even unlicensed persons, does not mean that the services are not accounting services; rather, it means that the licensee, when holding herself out as being dually licensed to perform these services in both capacities, remains subject to the licensure and discipline of both regulatory authorities. (R. 0554, 0621, 0671) See, e.g., Goldberg, A Lawyer's Multiple Occupations, 6 Wake Forest Intramural L. Rev. 191, 197 (1970).[6] Dual licensure is a common occurrence in Florida with many practitioners operating under both licenses. (R. 0309-10, 0685) It simply requires that the licensee comply with the more restrictive licensure standard in those instances where the professions have different requirements. (R.0671)[7]

As to the second element, Petitioner also admits to holding herself out to the public as a CPA when providing public accounting services. When asked whether she was holding herself out to the

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[6]In its brief, Amicus Curiae The Florida Bar recognizes the possibility of dual licensure, but argues that Petitioner is advertising her status only for biographical reasons. Id. at 7, 8, 12 n.5. The Board's Final Order reached a contrary conclusion. (Recommended Order, J.A. 156; Final Order, J.A. 184)

[7]The Florida Bar states it is a violation of their rules for lawyers not to hold out to their clients they are CPAs. Unfortunately, the Florida Bar did not participate in the proceeding below so that their assertions could be examined. However, there appear to be hundreds, if not thousands, of Florida lawyers who are CPAs who do not engage in the practice of holding out to the public they are CPAs. Therefore, if the Bar is correct, it seems strange that there is not one reported case of the Bar having disciplined a lawyer for not informing their client they are a CPA. The record below does show, however, that many lawyers who hold themselves out to their clients as CPAs are properly licensed to do so. (R. 0685)

public as a CPA, Petitioner stated: "So, if you're asking me am I holding out as a CPA -- for identification purposes, yes, I identify to the world I am a CPA." (J.A. 68; see also R. 0180, 0426, 0649; Petitioner's Initial Brief at 10) Petitioner testified that her clients considered it "extremely valuable" that she have an active CPA license and that she believed it was valuable for her to hold herself out to the public as a CPA:

> It is a series of things. For example, when I do representational work before the IRS, most of the clients that come to me and want an attorney for representation before the IRS they find that the fact that I hold a CPA license and worked for many years as a public accountant makes me--endows me with the ability to really understand the tax returns and defend the legal principles and advocate my client's position. So they feel that is an enhancement, that education baggage or those education marks that I have earned and worked so hard for.

(R. 0442-43; see also R. 0456, 0522)

Under the attorneys section in the yellow pages, Petitioner advertises her professional employment as "Ibanez, Sylvia S. CPA, CFP." (R. 1224) Under the white pages, Petitioner advertises her professional employment as "Ibanez, Sylvia S., CPA CFP ATTY." (R. 1224) In addition, Petitioner's business card states "Sylvia Safille Ibanez, J.D., CPA, CFP." (R. 1224) Although Petitioner disputes the efficacy of this advertisement, she admits that it would have an adverse impact on her practice if she were to stop advertising that she holds a CPA certificate. (R. 0456)

Petitioner and Amici Curiae argue that because she is not listed in the yellow pages under "public accountants" and because her law office only advertises the fact that she is a lawyer, this somehow negates her advertisements. The fallacy of this argument

is plain. The record shows that her advertisements were successful and that she has managed to convey to her clients and "the world" that she is a CPA. (R. 0456) The fact that Petitioner has chosen to refrain from advertising in one place while actively advertising in another does not diminish or remove the fact that she advertises to the public that she is a CPA. In the yellow pages listing under "attorneys," any member of the public seeking an attorney with public accounting skills would see her listing and believe that Petitioner is offering both legal and public accounting professional services.

Under no circumstances should Petitioner be permitted to advertise her availability to provide CPA services and then avoid the application and regulation of Chapter 473 by promising to disclaim otherwise. Such disclaimers in conjunction with advertising would constitute "bait and switch," be inherently misleading, and should be prohibited. Fla. Stat. § 473.323(g) (1993).

The Final Order found that potential clients "would clearly see respondent's use of the title 'CPA' in her advertisements as an inducement to contact Petitioner and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy." (J.A. at 189) The reason for this is obvious:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

(Recommended Order, J.A. 153)

Petitioner's advertisements communicate to the public that she is currently licensed as a CPA and is in compliance with the related technical and educational requirements. (Final Order, J.A. 180) To every member of the public who sees these advertisements, she is holding herself out as being competent, in good standing, and subject to the requirements for such professionals in providing public accounting services. However, to the Board of Accountancy, she says she is not practicing public accounting and will not comply with the laws related thereto. (J.A. 70).

The Department also presented testimony from Dean Dennison, Chairman of the Board of Accountancy and an expert in public accounting:

> If the public that's out there being served identifies a service or received a service, advice, counsel, whatever, from a person who does hold themselves out as a CPA, I think they have a right to expect that they [the CPA] would be disciplined and subject to the chapters that govern any CPA that holds themselves out.
>
> If the individual totally disassociates himself, even though he may keep his credentials current, if he or she disassociates herself with the identification of a CPA and they are there doing those other business activities and the public has no reason to believe that they are in any way holding themselves out, then I think the public doesn't have the same expectation for that person who has not held themselves out as a CPA, therefore, they are not expecting any more competency than anybody else, no matter what their licensure may be.

(R. 0659-60)[8] The Department, therefore, established by clear and convincing evidence that Petitioner is engaged in the practice of public accounting by providing public accounting services while holding herself out to the public as a CPA. (J.A. 180)

As to the final element, licensure of her firm, Florida also requires, as part of its regulatory requirements, that CPAs license their professional service corporations and partnerships with the State. Fla. Stat. §§ 473.309, 473.3101 (1991). There is no dispute that Petitioner has not licensed her firm in accord with the above provisions. Petitioner's Initial Brief at 21, 28. Contrary to Petitioner's arguments, the Department is not "hypothesiz[ing] that . . . [Petitioner] may run afoul of the Board's rules," -- Petitioner has run afoul of the Board's rules. Petitioner's Initial Brief at 21. By engaging in the practice of public accounting, Petitioner is required to comply with all of Florida's licensure regulations, including licensing her firm pursuant to sections 473.309 and 473.3101, Florida Statutes.

Petitioner argues that, "there is no evidence in the record as to why she should license the law firm as a CPA firm," and that her failure to license her firm "has no bearing on the fact that Petitioner is entitled to advertise that" she is a CPA. Petitioner's Initial Brief at 18, 28. Because Petitioner trades upon the fact that she is a CPA, provides services that she admits are public accounting services, and profits as a result thereof, she is engaged in the practice of public accounting and must comply with Florida's laws

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[8]The Department also presented the testimony of Louis W. Dooner, an expert in public accounting, who similarly testified that by advertising her CPA status while providing accounting services, Petitioner was engaged in the practice of public accounting. (J.A. 17-27)

regarding licensure. "[T]here is no arbitrary deprivation of [the right to continue to pursue a lawful occupation] where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society." Dent v. West Virginia, 129 U.S. 114, 122 (1889). Although she disagrees, those activities clearly bring her within Florida's definition of the practice of public accounting, and thus the requirement that she license her firm.

Accordingly, the Final Order entered by the Board correctly determined that Petitioner engaged in deceptive and misleading advertising in violation of subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code, by holding out that she is a CPA and rendering public accounting services as an employee of an unlicensed firm. (J.A. 194) The First Amendment, for the reasons set forth below, does not shelter Petitioner's clear violation of Florida law.[9]

C. The State of Florida May Discipline Petitioner for Practicing Public Accounting in an Unlicensed Firm Without Violating the First Amendment.

In order to shoehorn her claim into a First Amendment claim, Petitioner argues that Florida's provisions constitute a total ban on the disclosure of truthful, biographical information as to her professional credentials, which disclosure is constitutionally protected commercial speech under the First Amendment.

[9]Petitioner also argues that her failure to license her firm is irrelevant, "considering that the Board did not charge Ibanez with practicing in an unlicensed CPA firm." Petitioner's Initial Brief at 32. Contrary to Petitioner's statement, Petitioner was charged with practicing in an unlicensed firm. Although dismissed for being filed too late in the proceedings, it still formed the underlying factual basis for the charge of deceptive and misleading advertisements by advertising her CPA status while practicing public accounting as an employee of an unlicensed firm.

Nothing could be further from the truth. Having been granted her CPA certificate, Petitioner is free to advertise and disclose that status so long as she complies with the requirements of Chapter 473. Before this Court, she apparently has no problem in complying with Chapter 473's requirements. See Petitioner's Initial Brief, at 28, 18. In the lower proceedings, however, Petitioner strenuously objected to complying with Florida's requirements, arguing that she is not engaged in activity that would bring her within Chapter 473, that she is not subject to Chapter 473, and that she would not comply with its provisions. "I'm not practicing public accounting. I'm practicing law. So, why should they try to use those standards or that rule to measure my activities in the practice of law? I don't see it." (J.A. 70; see also J.A. 80, 93, 106; R. 425, 448) For the reasons set forth above, Petitioner is engaged in the practice of public accounting and is subject to Chapter 473's provisions. The First Amendment protection for commercial speech does not include protecting Petitioner's right to advertise as a CPA when in fact she has not complied with the requirements for being a CPA.

This Court applies a four-part test for determining the constitutionality of governmental regulations of commercial speech. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).[10] In its Final Order, the Board applied that test

[10]That test requires first, that the speech at issue concern a lawful activity and not be misleading; second, that the restriction on commercial speech serve a substantial governmental interest; third, that the regulation directly advance the asserted governmental interest; and fourth, that the regulation be no more extensive than necessary to advance such interests. Central Hudson, 447 U.S. at 566.

to Petitioner's advertisements to find its regulation constitutional under the First Amendment.

There can be no doubt that Petitioner fails the first element of the test in that Petitioner is unlawfully practicing public accounting by practicing in an unlicensed firm. No First Amendment protection exists for unlawful or deceptive activities, including Petitioner's. "The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976). The regulation prohibits deceptive conduct. Petitioner's refusal to register her firm while at the same time soliciting new accounting business as a CPA constitutes deceptive conduct. It is inherently misleading for Petitioner to advertise her status as a licensee, perform work associated with that license, and then refuse to be bound by the licensure and regulatory requirements for that license. The First Amendment does not prohibit states from restricting such deceptive conduct.

Directly analogous are cases which have restricted non-CPAs from advertising their services as public accountants. In Accountant's Soc. of Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988), the court stated:

> The state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants . . . . We believe that use of the title "public accountant" by a non-CPA fairly could be characterized as inherently misleading, given the possibility, accurately stated by the district court, that "some members of the public would believe the title . . . has the state's imprimatur."

Id. at 605.

Courts have a similar conclusion for other professions. Recently, in Grandee v. Glaser, 785 F. Supp. 684 (S.D. Ohio 1992), the court found the use of the term "audiologist" by hearing aid fitters to be inherently misleading:

> [T]he court believes that the use of the term "audiologist" by a hearing aid dealer is likely to materially deceive or mislead consumers as to the dealer's educational level. Such deception is "material" in that it is likely that consumers would find the educational level of such an individual an important consideration, and one that would most likely affect a choice. . . .

Id. at 691.

To the extent that Petitioner is seeking to trade upon her CPA license to obtain professional employment while at the same time refusing to comply with Chapter 473 for the provision of those services, this case is no different from the legion of cases which have prevented non-licensed individuals from holding themselves out as being licensed. See, e.g., Florida Acct. Ass'n v. Dandelake, 98 So. 2d 323 (Fla. 1957); Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978).

If Petitioner's activities are not found to be unlawful or inherently misleading, the second element requires that the State's interest be substantial. The State's interest in preventing a licensee from violating regulations imposed by the State and in preventing misleading advertisements is unquestionably substantial. "For purposes of that test, there is no question that Florida's interest in ensuring the accuracy of commercial information in the marketplace is substantial." Edenfield v. Fane, 507 U.S. ___, 123 L. Ed. 2d

543, 554, 113 S. Ct. 1792 (1993). This Court has recognized that, if not inherently misleading, then it is clearly potentially misleading for a licensee to advertise that one is "certified," but yet not be subject to state regulation. See Peel v. Atty. Registration and Disciplinary Comm'n, 496 U.S. 91 (1990)(Marshall, J., concurring). The State's interest in preventing potentially misleading advertisements is substantial.

The third element requires that the regulation directly advance the governmental interest. This requires the State to "demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." Edenfield, 123 L. Ed. 2d at 555. By requiring CPAs to be subject to the State's licensure and regulations, the State is acting in a direct and causal manner to further its interest of ensuring that those CPAs who hold themselves out as practicing public accountancy are indeed competent to do so. Indeed, holding oneself out as a professional not only represents that the individual has passed the necessary technical, educational and licensure requirements imposed by the state for a license for that particular profession, but also represents that the licensee is subject to the continued requirements for that license and sanctions for any violation. In fact, if Petitioner is not engaged in the practice of public accounting, the Board has no regulatory authority over her conduct or the quality of her work. Consumers who have their tax returns prepared by a CPA have a right to know that such regulatory authority is in place.

The fourth element, that there be a reasonable fit between the regulation and the state's interest, is met here. Florida simply requires those who hold themselves out as CPAs and who provide public accounting services remain subject to its licensure and regu-

lation. The regulation is directly tied to the State's interest in maintaining standards in the practice of accounting and is no more extensive than necessary. Contrary to Petitioner's argument, Florida's regulation does not constitute a total ban on her advertisements. The restriction is tailored narrowly so as to permit Petitioner to advertise her license, so long as she complies with Chapter 473. As such, Florida's regulation passes the fourth element. See Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).

The State seeks to ensure responsible and truthful advertising. Petitioner freely admits that she seeks to append the CPA after her name because her status as a CPA is valuable to her clients and that her practice would suffer if she could not. It should be axiomatic that when she holds herself out in her current professional practice as a CPA performing services which constitute public accounting services, Petitioner necessarily holds herself out not only as a CPA, but also as a CPA licensed and regulated by the State in that capacity.

Petitioner and Amici Curiae, however, argue that this Court's decision in Peel grants her the right to advertise her certificate as truthful, biographical information. First, Florida does not prohibit the disclosure of CPA status where the intent is to provide biographical information. The record reflected that procedures have been established by the Board to permit the disclosure of that information. (R. 0236, 0624-25) Petitioner simply chose not to utilize those procedures. Florida's regulation, therefore, does not constitute a total ban and Peel's concerns about truthful, biographical information does not apply.

More importantly, Peel did not concern the right to advertise such information where the certificate holder is not in compliance

with the standards for holding the certificate and, in fact, refuses to comply. Contrary to Petitioner's and Amici Curiae's argument, a CPA certificate is not simply an "attainment"; rather, it is a professional license with concomitant responsibilities and regulations. "[T]he CPA mark is clearly meaningful and denotes State licensure status as a licensed CPA." Petitioner's Initial Brief at 28. In these circumstances, it would be misleading to permit the licensee to advertise when the licensee does not comply, and refuses to comply, with her regulatory responsibilities. Florida "has done no more than require that commercial information about [accounting services] 'appear in such a form . . . as [is] necessary to prevent its being deceptive.'" Friedman v. Rogers, 440 U.S. 1, 16 (1979) (citation omitted).

Petitioner also argues that the Florida Legislature has granted CPAs the absolute right to advertise their CPA status, asserting that the legend on her CPA certificate provides that the recipient, "has passed all examinations and has met all other requirements prescribed by law and by rule of this Board for certification as an expert public accountant and is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this Board as a Certified Public Accountant." (R. 0088) Under no circumstances can the State's authorization for Petitioner to display her CPA license somehow operate to deprive the State of its continued licensure and regulation of Petitioner, including any advertisement of her CPA license. The CPA certificate is, of course, only evidence of a license and does not grant rights in and of itself. Petitioner errs in arguing that having been granted CPA status, the State thereafter lacks the ability to withdraw it or to regulate the manner in which it may be displayed.

For the foregoing reasons, the State's imposition of sanctions upon Petitioner for violating statutory provisions relating to licensure of professional service corporations is not a violation of the First Amendment.

D. The State of Florida May Regulate the Practice of Public Accounting by the Use of a Title Act.

Like most states, Florida regulates public accountancy through a "Title Act." Florida's definition of the practice of public accounting is the same as that set forth in the Uniform Accountancy Act. See American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, Uniform Accountancy Act, Section 3(g), 1 C.C.H. Acct. L. Rptr. ¶ 1035. The American Institute of Certified Public Accountants has adopted a similar definition. See AICPA, Code of Professional Conduct, 1 C.C.H. Acct. L. Rptr. ¶ 1066.

In addition to Florida, a number of other states have adopted the Model Act's definition. See, e.g., Conn. Gen. Stat. Ann. § 20-279(b)(7) (West 1993); Haw. Rev. Stat. § 466-3 (1992); Idaho Code § 54-206(20) (Supp. 1993); Iowa Code § 542C.2 (Supp. 1993); Me. Rev. Stat. Ann. tit. 32, § 12201 (West 1993); Mass. Gen. L. Ann. Ch. 13 § 87A (Supp. 1993); Tex. Rev. Civ. Stat. Ann. art 41A-1.2(a)(6)(A) (West Supp. 1994); Utah Code Ann. § 58-26-2(12) (Supp. 1993); Vt. Stat. Ann. tit. 26, § 13(7) (Supp. 1993); Wash. Rev. Code Ann. § 18.04.025(5) (West 1994). Another six states have adopted the Model Act's definition of public accounting in their administrative regulations. See Ark. Reg. § 1.12; D.C. Reg. § 2599; Ga. Comp. R. & Regs. r. 20-2-.11 (1978); Md. Regs. Code tit. 9, § 24.01.01(6)(a) (Supp. 1993); Neb.

Admin. R. & Regs., tit. 288, Ch. 3.001(16) (1989); 49 Pa. Code § 11.1 (1993).

Fifteen more states have enacted statutory or administrative rule definitions of "the practice of public accounting" that also include the term "holding out" and are similar to the definition in the Model Act. See Rules and Regulations of the Mississippi State Board of Accounting, 1 C.C.H. Acct. L. Rpts. ¶ 26,105(m); Okla. Stat. tit. 59, § 15.1A(27) (1994); Ind. Code § 25-2-1-2(e) (1991); La. Rev. Stat. Ann. § 37:72(1) (West 1994); Mich. Comp. Laws Ann. § 339.702(1)(d) (West 1993); Minn. Stat. § 326.165(2) (West 1994); Mo. Code Regs. tit. 4, § 10-2.050(9)(A) (1993); Nev. Rev. Stat. Ann. § 628.023 (Michie 1986); N.H. Rev. Stat. Ann. § 309-A:1 (IV) (1992); N.M. Stat. Ann. § 61-28A-3.G & I (1993); N.Y. Educ. Law § 7401 (McKinney 1993); N.C. Gen. Stat. § 93-1(2)(5) (1993); Tenn. Code Ann. § 62-1-103(5) (1993); W. Va. Code § 30-9-2 (1993); Wis. Stat. Ann. § 442.02 (1988).

Enacted to protect the public safety and welfare, title acts and their requirements for licensure permit the state to provide additional competence in a field without completely occupying it. See, e.g., Gellhorn, Occupational Licensing--A Nationwide Delemma, J. Acct. 39, 42-43 (Jan. 1960); Moore, The Purpose of Licensing, 4 J.L. & Econ. 93, 104 (1961). Title acts are utilized for a wide variety of services, including, for example, psychology. See, e.g., Fischer, State Regulation of Psychologists, 58 Wash. U.L.Q. 639 (1980). All title acts, however, have as part of their regulation a "holding out" requirement so that those who want to take advantage of being a licensee can do so, subject to concomitant regulation, while at the same time permitting those who either do not meet the requirements or do not want to be subject to the regulation, to also

practice in that area so long as they do not "hold out" as possessing a license.

Petitioner and Amici Curiae argue that regulation by the Board is unnecessary because she is also subject to regulation by The Florida Bar. The Board's concerns, however, apply not just to lawyers, but to any individual who holds themselves out as a CPA and provides public accounting services. Florida's concerns apply whether the CPA is an attorney or a bookkeeper. Suppose, for example, a licensed CPA decides to limit their practice to the preparation of tax returns. No license is required to provide this service. Under Petitioner's argument, such a licensee could tell the public that I am a CPA, "a truthful fact," but tell the Board I am not practicing public accounting. Absent a holding out requirement, there is simply no workable definition of the practice of public accounting. When a licensee holds out to the public they are a CPA and provides public accounting serves, the Board seeks to assure consumers that the CPA is subject to regulation in providing public accounting services.

Petitioner's challenge threatens the very foundation of title acts and the states' ability to utilize them effectively. If this Court grants Petitioner the relief she seeks, the effect will be to eviscerate the states' ability to regulate through title acts. By assuring consumers that practitioners in a licensed field have met certain standards, the states have provided consumers with additional information as to the standard of care and conduct that will be provided. Permitting licensees to hold out that they are licensed but deny they are subject to regulation, will require the public to engage in additional research as to the standard of conduct and care that will be applicable. This will result in an increase in consumer

confusion, not a reduction. Because the distinction between such statuses would be confusing, permitting licensees to hold out would result in consumers receiving less protection. This Court should therefore affirm the decisions below.

II. THE STATE OF FLORIDA'S REGULATION OF THE USE OF THE TERM "CERTIFIED" DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The State of Florida Properly Sanctioned Petitioner for Appending Her CFP Designation While Rendering Public Accounting Services.

Count II of the Amended Administrative Complaint alleged that Petitioner's use of the CPA and CFP designations after her name violated section 473.323(1)(f) and Rule 21A-24.001(i). The Department also submitted clear and convincing evidence in support of these allegations. The rule at issue prohibits the use by a CPA of designations which contain the terms "certified," "public," or "auditor" because the use of those terms in conjunction with CPA is confusing and deceptive as implying state licensure.

In 1991, Florida's Board of Public Accountancy adopted the current version of Rule 21A-24.001(j), which allows licensees to utilize certain designations with the disclosure of certain information. However, in order to avoid obvious confusion with state licensing requirements, the Board also adopted Rule 21A-24.001(i), which prohibits certified public accountants from using the use term "certified" in connection with designations it has not approved.

Under the clear terms of the prohibition, Petitioner's use and advertisement of her CFP status while engaging in the practice of public accounting violated Rule 21A-24.001(i) and the Department carried its burden of showing that Petitioner advertised her "CFP"

designation in violation of that Rule. (J.A. 36-40, 48) The First Amendment does not shelter Petitioner's intentional violation of Florida law.

B. The State of Florida's Regulation of the Use of the Term CFP When the Term is Used by CPAs Does Not Violate the First Amendment.

Under Central Hudson's test, it is inherently misleading to permit the use of designations which include the term "certified" in conjunction with the term "certified public accountant." When such terms are used in conjunction with each other, their use will create confusion in the minds of the public as to whether the other "certified" designation is licensed by the State. For that reason, the State may limit its use so as not to be misleading.

If the use of that term is not inherently misleading, then the second element requires that the State's interest be substantial before the State may prohibit the use of the term "certified." In Peel, Justice Marshall in his concurrence, noted that it would be potentially misleading for a state to permit a CPA to advertise his CPA license in conjunction with another designation that contained the term "certified," as the public might understand that as connoting governmental authorization or certification. 496 U.S. at 113. This is the State's concern and it establishes the State's substantial interest in regulating the use of the term "certified" in conjunction with the term CPA.

As to the third element, the prohibition directly advances the State's concerns. Because the terms CPA and CFP are similar when used in conjunction with each other, the State may regulate their use so as to limit the confusion that will be created in the minds of the public as to which designations are licensed by the

State. The regulation directly advances that interest by regulating its use.

With regard to the fourth element of Central Hudson, that the regulation be no more extensive than necessary, Florida's regulations are carefully tailored. Since 1982, the Board has consistently issued letter opinions that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board. (Recommended Order, J.A. 157) Except where prohibited by Rule 21A-24.00(1)(i), Rule 21A-24.001(1)(j) permits a licensee to disclose any formal recognition as long as "the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government . . . [and that it] contain the agency's requirements for recognition, including, but not limited to, education, experience and testing."[11] Petitioner errs in asserting that Florida's regulation does not permit the disclosure of information as required by Peel. See Rule 21A-24.001(j). This rule meets the requirements of Peel. Unfortunately, as with other requirements of Florida law, Petitioner made no attempt to comply with the provisions of the statute.

Petitioners rely heavily upon Peel, which struck Arizona's prohibition because the First Amendment allows the disclosure of truthful information where disclaimers are available to address the state's concerns. However, because the Board has found the use of the term "certified" to be confusing, it can only be used when approved by the Board. As the Final Order noted, "no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate . . ." (J.A. 194)

[11]It should be noted that Petitioner has not challenged the constitutionality of this provision.

Florida's regulation, therefore, is narrowly tailored to its concerns and permits alternatives which Petitioner chose not to pursue.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeal of Florida should be affirmed.

Respectfully submitted,

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